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July 26, 2018

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch:

The Commission should adopt a "deemed granted" remedy for violations by state or local governments of the shot clocks adopted under Section 332 of the Communications Act.[1] In its Notice in this proceeding, the Commission sought comment on and Verizon supported three proposals for a deemed granted remedy.[2] We continue to believe that the Commission has ample authority to adopt a deemed granted remedy under Section 332(c) as described in those Comments and that a deemed granted remedy most effectively advances the national goal of 5G deployment by ensuring prompt siting decisions by local governments. In the event that the Commission does not take this step, however, Verizon sets out here an alternative approach that would deliver many of the benefits of a pure deemed granted remedy while providing additional procedural safeguards to localities.

Section 332(c)(7) requires that state and local governments act on siting requests "within a reasonable period of time" and states that applicants are "adversely affected" by a "failure to act."[3] Pursuant to this authority, the Commission adopted shot clocks of "presumptively, 90 days to process personal wireless service facility siting applications requesting collocations, and,

[1] 47 U.S.C. § 332(c)(7)(B)(ii).

[2] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) ("Notice"); Comments of Verizon at 35-41, WT Docket Nos. 17-79 and 17-84 (June 15, 2017); Reply Comments of Verizon at 28-32, WT Docket Nos. 17-79 and 17-84 (July 17, 2017).

[3] 47 U.S.C. § 332(c)(7)(B)(ii), (v).

also presumptively, 150 days to process all other applications."[4] The Fifth Circuit and Supreme Court affirmed the Commission's authority to adopt rules implementing Section 332(c)(7) in *City of Arlington v. FCC*, rejecting claims from state and local governments that the adoption of shot clocks for siting decisions unlawfully impinged upon state and local authority.[5] The Supreme Court confirmed that the shot-clock rules are entitled to deference under *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc*.[6] In the 2009 *332 Shot Clock Ruling* and again in its *2014 Infrastructure Order*,[7] the Commission considered but ultimately did not adopt a deemed granted remedy for violations of these shot clocks, but it never stated that it lacked the authority to do so.[8] Experience since 2014 has confirmed that the shot clocks for wireless siting applications that lack a deemed granted remedy are largely ineffective due to the absence of a meaningful enforcement mechanism.[9]

The Commission has the authority to issue a rule that establishes an effective remedy should states or localities fail to act within a reasonable time. To address any concerns about the availability of a judicial remedy under Section 332, the Commission should adopt the following regime: At the expiration of the applicable shot clock, the Commission should apply a rebuttable presumption that the state or locality unlawfully failed to act. Under this proposal, upon expiration of the shot clock, the applicant would notify the state or locality in writing that, in 30 days or thereafter, it intends to begin construction on the project for which the shot clock had run, unless the state or locality receives a court order extending the period to evaluate the permit application. The rule would provide the state or locality an additional 30 days after the receipt of the notice to obtain a declaratory order from a federal court granting the state or locality more time to consider the application and thereby prevent the application from being deemed granted. To prevail in court, the state or locality would need to demonstrate that the "nature and scope" of the provider's request is sufficiently more burdensome than other wireless permit applications so as to warrant additional time beyond the presumptive time frame provided by the shot clock.[10] Courts would determine the merits of the request for additional time under the same standard they currently use to adjudicate requests under Section 332(c)(7)(B)(v) for injunctive relief sought by a provider after the expiration of the shot clock. The key difference from the status

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[4] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14005 at ¶ 32 (2009) ("*332 Shot Clock Ruling*"), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd, City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

[5] *City of Arlington v. FCC*, 668 F.3d at 249–50; *City of Arlington v. FCC*, 133 S. Ct. at 1871-73.

[6] 467 U.S. 837, 844 (1984); *see City of Arlington*, 133 S. Ct. at 1868-69.

[7] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865 (2014) ("*2014 Infrastructure Order"*).

[8] *Id.* at 12977-78, ¶¶ 281-285; *332 Shot Clock Ruling* 24 FCC Rcd at 14003-09, ¶¶ 27-42.

[9] *See* Comments of Verizon at 35-36, WT Docket Nos. 17-79 and 17-84.

[10] 47 U.S.C. § 332(c)(7)(B)(ii).

quo is that, should the state or locality fail to obtain such an order in federal court within the 30-day window, the application is deemed granted.

Adopting a rule that mandates this approach is within the Commission's authority and consistent with the balance struck by the Communications Act. First, the Commission has adopted deemed granted remedies in the past for similar statutes it administers, and the courts of appeals have upheld those orders. In *Alliance for Community Media v. FCC*,[11] the Sixth Circuit upheld the FCC's adoption of a shot clock and deemed granted remedy under the Cable Act for a provision stating that "[a] franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise."[12] The court found that the FCC's shot clock was reasonable because it was "a way to remedy the excessive delays result[ing] in unreasonable refusals to award competitive franchises."[13] Similarly, in *Montgomery Cnty., Md. v. FCC*,[14] the Fourth Circuit upheld the deemed granted remedy adopted by the Commission in the *2014 Infrastructure Order* for Section 6409 of the Spectrum Act. Neither of these courts found any infirmity with the Commission's adoption of a deemed granted remedy in these similar contexts.

Second, the proposed alternative is consistent with the Commission's previous interpretations of Section 332. In the *332 Shot Clock Order*, the Commission emphasized "the opportunities that we have built into the process for ensuring individualized consideration of the nature and scope of each siting request."[15] The approach described above preserves this opportunity, first by allowing each state or locality to apply individualized consideration of each request during the shot clock period, and second by allowing a state or locality to secure more time to review a siting request if a court deems that such time is necessary and reasonable under the circumstances. An application will not be deemed granted without a state or locality first having the option to explain the reasonableness of its actions before an Article III court.[16]

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[11] 529 F.3d 763 (6th Cir. 2008).

[12] 47 U.S.C. 541; *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5133-37 at ¶¶ 66-73 (2007) ("*Cable Franchising Report and Order*").

[13] 529 F.3d at 780.

[14] 811 F.3d 121 (4th Cir. 2015).

[15] *332 Shot Clock Ruling* 24 FCC Rcd at 14009, ¶ 41.

[16] The mechanism by which the state or locality will bring an action to explain why it requires more time would be a declaratory judgment action seeking an order that it has not violated Section 332(c)(7)(B)(v). A declaratory judgment action by a state or locality would be appropriate under these circumstances as a means of resolving a live controversy between the locality and the provider. The provider could bring a suit under Section 332(c)(7)(B)(v) alleging that the state or local government's failure to act violates Section 332(c)(B)(ii) as construed by the Commission, and seeking appropriate relief including an injunction directing the state or locality to issue a permit. Because the provider could bring such an action either before or after

As the Fifth Circuit noted in in *City of Arlington*, the Commission's shot clock did not create "hard and fast rules but instead exist[s] to guide courts in their consideration of cases challenging state or local government inaction."[17] The approach described here operates identically: as with the shot clock itself, imposing the deemed granted remedy does not divest courts of the ability to evaluate a state or local government's failure to comply with the Commission's rules. Instead, a state and local government can, as the Fifth Circuit foresaw in *City of Arlington*, "submit any evidence demonstrating the reasonableness of its inaction," allowing a court to determine whether a delay beyond the shot clock is permissible.[18] But, as the court explained, where a state or locality fails to present such evidence, "the government's failure to comply with the FCC's time frames will likely be dispositive of the question of the government's compliance with § 332(c)(7)(B)(ii)."[19] Similarly, under this approach, the deemed granted remedy is only dispositive in cases where a state or locality does not comply with *both* the applicable shot clock period *and* the additional 30-day period after receipt of a provider's written notice during which it can seek a court order that its delay is not unreasonable. As the Fifth Circuit explained in upholding the *332 Shot Clock Order*, such a regime does not "creat[e] a scheme in which a state or local government's failure to meet the FCC's time frames constitutes a *per se* violation of § 332(c)(7)(B)(ii)."

Finally, this proposal is entirely consistent with a statement in the Conference Report issued in connection with the Telecommunications Act of 1996 that "[i]t is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) . . . the courts shall have exclusive jurisdiction over all . . . disputes arising under this section."[20] The *City of Arlington* court rejected the argument from localities that this statement prevents the Commission from implementing Section 332(c)(7)(B).[21] And nothing in this approach divests courts of jurisdiction over disputes over wireless siting decisions: Any state or locality that does not decide an application within the applicable shot clock may seek a ruling from a court that would justify additional time to make a decision.

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the shot clock has run, and because the provider will have issued the government entity written notice indicating that it intends to build the wireless facility absent an order of the court, the controversy is sufficiently real as to warrant the state or local government's invocation of the federal court's jurisdiction under the Declaratory Judgment Act. *See, e.g., GTE Directories Pub. Corp. v. Trimen Am., Inc.*, 67 F.3d 1563, 1569 (11th Cir. 1995) (noting that a "real and reasonable apprehension" of adverse action was sufficient to create justiciability under the declaratory judgment act); *Nat'l Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 566 & n.2 (9th Cir. 1987) (noting that all "declaratory judgments will be in some sense hypothetical," but that where the parties are in "direct conflict" on issues on which one may bring suit, a declaratory judgment action is proper).

[17] 668 F.3d at 259.

[18] *Id.*

[19] *Id.*

[20] S. Rep. No. 104-230, at 207-08 (1996) (Conf. Rep.).

[21] 668 F.3d at 253.

For the reasons described in Verizon's Comments on the Notice, the shot clock adopted by the Commission in 2009 has not been effective in preventing substantial delays that have interfered and will continue to interfere with the implementation of the next generation of wireless technology.[22] The proposal outlined here, which would provide a deemed granted remedy only after the expiration of the shot clock and an additional 30-day period during which a state or locality could seek a court order extending its time to consider an application, strikes an appropriate balance between the needs of state and local governments to maintain control over wireless siting decisions and the needs of providers, consumers, and the nation to deploy fast and reliable wireless service.

Sincerely,

cc: (via e-mail)

Nicholas Degani	Donald Stockdale
Michael Carowitz	Suzanne Tetreault
Erin McGrath	Garnet Hanly
Will Adams	
Umair Javed	

[22] *See* Comments of Verizon at 35-36, WT Docket Nos. 17-79 and 17-84.